

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED WITH THE
COURT SECURITY OFFICER
CSO
DATE 11/26/08

UNITED STATES,
Appellee,

vs.

ZACARIAS MOUSSAOUI
Appellant.

FILED: November 26, 2008

No. 06-4494
Crim. No. 01-455-A

APPELLANT'S REPLY IN SUPPORT
OF CONTESTED RENEWED MOTION FOR LIMITED REMAND

Beginning in September 2002, and continuing through and after this Court issued its opinion on September 13, 2004, in *United States v. Moussaoui*, No. 03-4792, Classified Opinion and Order (Sept. 13, 2004) ("Moussaoui II"), the central issue in this case was whether Moussaoui should be afforded access to several witnesses who were in the custody of the Government and who either Moussaoui or his lawyers specifically identified as material witnesses. Moussaoui, his lawyers, the district court and this Court each made significant judgments and decisions relating to this central issue without – as it turns out – critical information that only the Government possessed: that there were videotapes and audiotapes of the interrogations of the witnesses. Now, based on the Government's stunning disclosures about these tapes, how they were created, and

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how many there may be, Moussaoui has requested very limited relief: a limited remand to the district court so that the court can determine the facts and the consequences to Moussaoui's plea.

The Government has aggressively fought any idea of a limited remand, and the Government makes it appear that the only tapes arguably relevant to this appeal are those relating to [REDACTED]. And, even with respect to [REDACTED] the Government asserts that no further information is necessary to deny remand because nothing about the tapes could have affected Moussaoui's plea.

The Government's attempt to focus on the "trees" and ignore the "forest" should be unavailing. As set forth below, when viewed in context, there is no question that this Court should remand the case for the district court to determine the facts and the effect on Moussaoui's plea.

BACKGROUND

As noted above, these tapes relate to two critical issues that were before the district court and this Court prior to Moussaoui's plea: (1) whether certain witnesses in the custody of the Government were "material" witnesses to whom Moussaoui was entitled access; and (2) whether Moussaoui was entitled to access to live witnesses or whether access to certain intelligence summaries – which were to serve as a basis for substitutions for testimony of the witnesses at trial – was sufficient.

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According to the procedures set by the district court, the first step on this issue was for the court to determine whether these witnesses were material. CJA0319. Then, after the court determined that witnesses were material, the district court sought to determine whether Moussaoui was entitled under the Constitution to access to the live witnesses or whether it sufficed that Moussaoui would have access to only intelligence summaries that had been prepared by the intelligence agencies based on the [REDACTED] cables. In this second determination, the central issue was whether the intelligence summaries were reliable. CJA0587-58.

As a practical matter, this is what happened on the way to making these determinations:

(1) The Government initially produced to the district court certain [REDACTED] cables” – which were represented to be the closest thing available to original source material from the witness interrogations – along with certain intelligence “summaries” whose content was taken exclusively from the [REDACTED] cables.¹ The Government requested that the district court approve production of certain intelligence summaries – which were classified – as substitutes for the [REDACTED] cables – which were also classified. *See, e.g.*, CJA0859-61. In each instance, the district court apparently compared the

¹ Ex. C to Contested Renewed Motion for Limited Remand.

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intelligence summaries to the [REDACTED] cables before approving the production of the summaries in lieu of the [REDACTED] cables. *See, e.g.*, CJA0583. Because the Government did not produce the tapes, the district court was never permitted to compare the intelligence summaries or the [REDACTED] cables to any audiotapes or videotapes of the interrogations.

(2) The Government turned over to defense counsel only certain classified intelligence summaries (and not the [REDACTED] cables or the tapes). *Moussaoui II* at 6 n.5. Defense counsel were then forced – without their client being present for or fully participating in the proceedings – to attempt to demonstrate to the district court why these witnesses were material. *See, e.g.*, Ex. A to Contested Renewed Motion for Limited Remand. Moreover, defense counsel were required to demonstrate materiality based on intelligence summaries – not the [REDACTED] cables or the tapes – and those intelligence summaries had been prepared for a different purpose and were several degrees removed from the original source information. *See Moussaoui II*, 382 F.3d at 6 n.5. In addition, the intelligence summaries provided no information about the methods of interrogation or other issues relating to the reliability of the summaries.

(3) Moussaoui originally requested access to [REDACTED] witnesses in the fall of 2002: [REDACTED] (see JA1134, JA6004A-O), Abu Zubaydah (CJA0181), and [REDACTED] (CJA0233A). Even without the full participation of

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Moussaoui in the process, Moussaoui's lawyers were able to demonstrate that [REDACTED] was a material witness; however, without full access to the statements by Zubaydah [REDACTED], and without the participation of Moussaoui – who had been excluded from the hearings and prevented from seeing any of the intelligence summaries because they had not been produced in unclassified form – the defense counsel were unable at that time to convince the Court that those other two witnesses were material. *See, e.g.,* Ex. A to Contested Renewed Motion for Limited Remand; *see also* CJA0320. The Government agreed, however, to continue to produce discovery on at least Zubaydah. Ex. N to Appellant's Reply in Support of Contested Motion for Limited Remand, at 5-6.

(4) Having concluded that [REDACTED] was a material witness, the district court then sought to determine whether, as the Government requested, it was sufficient for Moussaoui's lawyers to have access to the intelligence summaries, or whether Moussaoui and/or his lawyers must have in person access to [REDACTED]. *See* CJA0444-45. In this determination, it was critical to the district court to know whether there was any other original source material whatsoever to which the court could compare the intelligence summaries. *See* CJA0588-89. For that reason, the district court specifically asked the Government whether these witness

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interrogations were being recorded, either by audio or by video.² *Id.* It was clear to everyone involved that the district court was making this inquiry generally; indeed, the Government's oral response at the argument made this clear:

THE COURT: Mr. Spencer, do you know how those interrogations are recorded, whether they are and how [. . .]?

THE GOVERNMENT: Your Honor, I think what we would ask to do is to make formal inquiry of that fact.

THE COURT: You-all don't know?

THE GOVERNMENT: We don't. We don't have any . . . knowledge as to if there are any, which ones are, whether or not they're kept, how they're kept. We don't – we haven't inquired as to that process *as a general matter or as to the specific handling of* [REDACTED]³

(5) Nonetheless, the Government only answered the question as to

[REDACTED] explaining that the interrogations [REDACTED] were not being recorded in "any format." Ex. A to Contested Motion for Limited Remand at 4.

(6) Thus, as a result of two circumstances, the district court was left with the clear impression that there were no tapes of any of these interrogations: (1) when the Government was requesting authorization to produce classified intelligence summaries, it was requesting that those summaries be produced in lieu of the [REDACTED] cables and not tapes (which would have been the best evidence of what actually occurred at the interrogations); and (2) when the district court asked

² As set forth in prior briefing relating to remand, there were several later inquiries by the district court into the taping of witness interrogations.

³ CJA0588-89 (emphasis added).

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whether “these interrogations” are being recorded – in the context of discussing one of the most sensitive witnesses in United States custody – the Government represented that they were not.

(7) While the issue of witness access to the [REDACTED] witnesses was being litigated, other witnesses in the custody of the Government also became relevant. For example, following a request from Moussaoui and his counsel, on August 29, 2003, the district court concluded that [REDACTED] [REDACTED] also were material witnesses. CJA0839. In addition, while the district court and this Court were considering these witness access issues, another witness [REDACTED] was identified as a material witness in part from references in the intelligence summaries [REDACTED] CJA0700. As a result, defense counsel specifically mentioned [REDACTED] as a material witness during the argument before this Court. Ex. B to Contested Renewed Motion for Limited Remand.

(8) As this Court knows, the district court ultimately concluded that Moussaoui was entitled to some in-person access to the material witnesses in the custody of the Government, and this Court ultimately concluded that the intelligence summaries could be sufficient substitutes for access to the witnesses. *Moussaoui II* at 59. However, during arguments on this matter, there were several discussions about whether the intelligence summaries were reliable, and the

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Government's lawyers did not – because they apparently did not have access to the same information possessed by the intelligence agencies – ever advise this Court that there were tapes that may have demonstrated whether or not the intelligence summaries were reliable.

(9) The Government's disclosures relating to the tapes, especially the most recent disclosures on September 5, 2008, now admit that witness interrogations – including those of Zubaydah [REDACTED] – were in fact recorded by audio and/or video. Exs. D, E and F to Contested Renewed Motion for Limited Remand. Moreover, the Government's disclosures strongly suggest that, to avoid having the United States government interrogate the witnesses and possess these tapes, the United States government would: [REDACTED]

[REDACTED] Although the Government has not stated as much, it is a fair assumption that this same process took place with respect to other witnesses. [REDACTED] Moreover, even though some tapes that were in the custody of the Government were apparently destroyed, it may be that the Government has "on demand" access to copies of these same tapes [REDACTED]

[REDACTED] All of this demonstrates why some factual

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development on these issues is necessary in order for a reasoned judgment to be made about the consequences to (1) this Court's prior determination that the intelligence summaries were, as a matter of law, "reliable" and (2) Moussaoui's plea.

(10) Finally, as we understand the Government's disclosures, the lawyers prosecuting Moussaoui were never informed, in any way, that any witness interrogations had been recorded by audio or video tape or that such tapes were at any time in existence or were available to the Government. In addition, no lawyer of the prosecuting team had been informed about this taping until sometime in 2007.

ARGUMENT

Stepping back from the trees to see the forest, the availability of original source materials from the witness interrogations would have been critical evidence – both on the question of whether these witnesses were material and on the question of whether Moussaoui was entitled to access to the live witnesses – during the proceedings prior to Moussaoui's plea. Both the district court and this Court specifically inquired about the availability of such evidence. The Government's Opposition to Moussaoui's Renewed Motion (the "Opposition") attempts to minimize the scope and significance of the misstatements by the Government to

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this Court and to the district court. Contrary to the Government's suggestion, these actions were not presumptively free of harm.

If the facts are as they appear, the misstatements by the Government spoiled the integrity of the process that led to this Court's ruling and, together with the district court, established the unprecedented procedures to be used in this unique national security case. If so, as explained in several previous filings, these misstatements by the Government also undermined the validity of Moussaoui's plea – which was itself prompted by the outcome of those spoiled proceedings. At the end of the day, Moussaoui still seeks very limited relief – the type of relief that is routine on these kinds of issues – a limited remand to the district court for proper development of the record.

The Government's Opposition makes three arguments in response, and we address them in turn below.

I. THE EXISTENCE OF THE TAPES WOULD HAVE BEEN RELEVANT TO A NUMBER OF CRITICAL ISSUES BEFORE THE DISTRICT COURT AND THIS COURT.

A. The District Court and This Court Had Broadly Inquired Into the Existence of Source Materials from the Witness Interrogations.

The first question presented by the Government's Opposition is: If the Government's lawyers had known, prior to Moussaoui's plea, that the Government had been taping the witness interrogations and that such interrogations were in existence or available to the United States, would the Government's lawyers have

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felt compelled at that time to disclose that fact or the tapes to the court? The answer is unquestionably in the affirmative.

The issues before the courts at the time of the Government's incorrect representations were: (1) whether the witnesses at issue were material and (2) whether Moussaoui was entitled to in person access to those witnesses. *See Moussaoui II* at 1. To that end, the Government was repeatedly asked specific, but broad, questions about its taping of witness interrogations. *See* Ex. C to Contested Renewed Motion for Limited Remand, at 33 (Judge Williams: "Is there anything else that is written or produced from what the interrogation actually was or only the cable? Is that the only thing that is left other than what's in the mind of the interrogator?"); CJA0588-89 (District Court: "[D]o you know how those interrogations are recorded, whether they are and how[?]"). Critically, the Government's response at the time of the question by the district court demonstrates its own recognition of the questions' breadth. *See* CJA0588-89 ("We don't – we haven't inquired as to that process *as a general matter or as to the specific handling of* [REDACTED] (emphasis added).

In its papers, the Government now seems to be suggesting that, even if the question by the district court had been more general and even if the Government had said it would be examining the issue of taping as a general matter, because the Government only submitted a narrow answer that named [REDACTED] the general

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inquiry was no longer at issue. This is not a fair argument. The Government was required to respect the fair meaning of the Courts' questioning and not to answer in a manner that foreclosed the line of inquiry. *See Demjanjuk v. Petrovsky*, 10 F.3d 338, 342 (6th Cir. 1994) (holding that government attorneys "consistently followed an unjustifiedly narrow view of the scope of their duty to disclose" and thereby deprived the defendant "and the court . . . of information and materials that were critical to building the defense"); *cf. United States v. DeZarn*, 157 F.3d 1042, 1048-49 (6th Cir. 1998) (noting the problems with responding "categorically" and with a "literally true" answer to a question containing a mistaken premise where the defendant "knew exactly what the questions meant and exactly what they were referring to"). Of course, the Government does not contend that it actually made this narrow interpretation at the time the questions were put to the prosecution; to the contrary, the Government's position is that the lawyers on the prosecuting team were unaware of *any* tapes.

Thus, it is clear that the district court and this Court inquired into source materials and tapes as a general matter. There thus can be no doubt that, if at the time of the inquiries by the district court and this Court, the Government's lawyers had known about the recordings, they would have been bound to disclose everything they now have disclosed about the tapes.

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B. The Inquiries Relating to the Tapes Pertained to Each of the Potential Material Witnesses.

Even the Government seems to concede that it was required to disclose the existence of the tapes with respect to [REDACTED] but the Government asserts that it was under no obligation to disclose any facts about the taping with respect to any other witness. Once again, this assertion ignores the context set forth above in which the district court made its inquiries about the tapes. Moreover, if the Government had correctly answered the district court's question with respect to [REDACTED] the district court would have known that these tapes existed and could have made specific inquiries about the existence of tapes for the other witnesses – like [REDACTED] Zubaydah, and [REDACTED] – who were also at issue and who the district court understood would be subject to the same analysis. *See, e.g.*, CJA0582. But, when the Government specifically represented to the district court that the [REDACTED] interrogations were not being recorded, that representation – along with the fact that the Government had been presenting operational cables as the closest thing to source material against which the intelligence summaries could be compared – confirmed that there was no need to specifically follow-up for these other witnesses.

In short, the question of whether the Government was taping the interrogations and had access to those tapes was clearly not limited to [REDACTED]

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rather, it was broadly requested. This questions was relevant to both whether the witnesses were material and whether Moussaoui was entitled to in person access.

II. THE GOVERNMENT IS WRONG TO ASSERT THAT ACCESS TO [REDACTED] WAS NOT AT ISSUE AT THE TIME.

The next question is: Did the Government and the court know that Moussaoui was also seeking access to [REDACTED] prior to Moussaoui's plea? The Government spends significant time attempting to argue that the tapes relating to [REDACTED] were never at issue in the prior proceedings and could have had no effect on Moussaoui's plea. The Government's argument on this point is similar to the argument as to Zubaydah,⁴ and it is simply not the case, as the Government contends, that [REDACTED] was not in issue at the time of the incorrect representations.

The Government has suggested that because Moussaoui's counsel did not file a formal motion for access to [REDACTED] until after Moussaoui pled guilty, the existence of recordings of [REDACTED] could not have affected Moussaoui's plea.

But the reality is quite different. As discussed in the original Motion for Limited

⁴ In prior briefing, the Government had argued that the tapes relating to Zubaydah were not at issue because the district court determined that Zubaydah was not a material witness. As Moussaoui argued previously, if Moussaoui had been permitted to participate in the proceedings relating to Zubaydah, and if the Government had produced the tapes on Zubaydah, the materiality determination would have come out differently. But, in any event, if the district court and the parties had known about the tapes at the time, there would have been some basis to examine the reliability of the intelligence summaries for Zubaydah, which, in turn, would have affected Moussaoui's decision to plead guilty.

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Remand, Moussaoui first began seeking access to detainee witnesses in September 2002. In [REDACTED] 2003, the Government began providing unclassified documents that contained some innocuous statements apparently made by [REDACTED]. However, a few weeks later, the Government provided some classified intelligence summaries of [REDACTED] that indicated that [REDACTED] may have been intended to be 20th Hijacker in the September 11 attacks. CJA0700. As a result, on December 3, 2003, during oral argument on the issue of access to these material witnesses, and prior to Moussaoui's plea, Moussaoui's lawyer specifically named [REDACTED] as another witness to whom he would need access because he was someone connected to [REDACTED] and who had attempted to enter the United States [REDACTED] Ex. B to Contested Renewed Motion for Limited Remand ("We need these witnesses[.]"). Thus, prior to Moussaoui's plea, [REDACTED] was clearly identified as a material witness, and this identification of [REDACTED] came during the argument on whether the written summaries were reliable. It was thus clear that [REDACTED] written statements would be subject to the same analysis as was being applied to those for [REDACTED]

Moreover, the Government ignores that the inquiries into the taping were made to ascertain whether summaries of statements produced to defense counsel

⁵ It was not until [REDACTED] 2004 that the Government produced classified documents containing statements by [REDACTED] that suggested a connection to the September 11 attacks.

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were reliable. Thus, the existence of any recordings that could be compared to any summaries would have been vital. The existence of these recordings of [REDACTED] would have been entirely relevant to the district court's and this Court's inquiries.

III. REMAND IS NECESSARY TO DETERMINE THE FACTS AND THE EFFECT ON MOUSSAOUI'S PLEA.

In this context, this case should be temporarily remanded to the district court. The district court can make appropriate inquiries into, among other things, what tapes exist, what is on those tapes, and whether the Government has access to tapes of these witness interrogations.⁶ It is only once there is a full record relating to the tapes, including the creation, destruction, scope, and content of the tapes, that any court can make a determination about the effect on Moussaoui's plea.

It is possible, for example, that there are tapes on which [REDACTED] or others specifically state, in a credible manner, that Moussaoui had nothing whatsoever to do with the crimes to which Moussaoui pled. It is possible, for example, that those same tapes would show that when witness made statements that tended to cast a negative light on Moussaoui, the witness was not speaking credibly or was speaking under the influence of coercive interrogation techniques.

⁶ For instance, it may be that [REDACTED] [REDACTED] currently has many other tapes [REDACTED] or others and that the Government has access to these tapes on demand. Of course, the Government is sure to argue that there is no obligation to produce or even disclose that fact, but the district court should at least be given a chance to inquire into the facts.

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It is possible that there are tapes easily within the reach of the Government that would show that all of the intelligence summaries were in fact completely unreliable. We have been forced to speculate in this manner because the Government's disclosures have been carefully and artfully written, and there remain many unanswered questions about these tapes. But, only once the district court or this Court ascertain the facts, can the district court or this Court determine the effect of this information on Moussaoui's decision to plead.⁷

⁷ To the extent the Government indicates that Moussaoui should be submitting any evidence relating to the tapes, that argument is without merit. First, the entire purpose for seeking a remand is so that the parties can mutually develop the facts before the district court. Second, most of the evidence relating to this Motion for Remand has been classified and has not been produced in unclassified form. As a result, it cannot be shared outside cleared counsel.

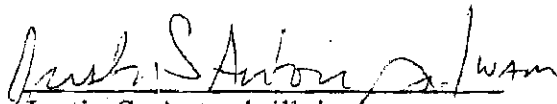
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CONCLUSION

This Court should remand the case for an appropriate determination of the facts and determination of the effect on Moussaoui's decision to plead.⁸

Respectfully submitted,


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⁸ The Government is wrong to suggest that this Court should ignore the misconduct because an internal investigation is currently under way in the Justice Department. The Justice Department inquiry may not fully vindicate the issues here, and in any event, the purpose of this Motion is to determine the effect on Moussaoui's plea.

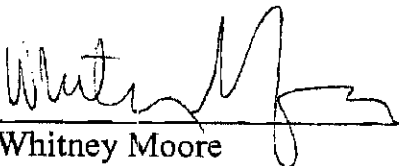
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CERTIFICATE OF SERVICE

I certify that on November 26, 2008, a copy of the foregoing pleading was served on the Court Security Officer for distribution to the following counsel:

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**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

FILED WITH THE
COURT SECRETARY OFFICER
CSO: [Signature]
DATE: 2/26/08

UNITED STATES,

Appellee,

vs.

ZACARIAS MOUSSAOUI

Appellant.

No. 06-4494
Crim No. 01-455-A

**APPELLANT'S MOTION
TO EXCEED THE PAGE LIMITS**

Appellant Zacarias Moussaoui, by undersigned counsel, respectfully moves this Court to allow appellant to exceed the page limits imposed by Local Rule 27(d)(2).

In support of this motion, appellant states:

1. Local Rule 27(d)(2) permits a party to submit a reply to a response to a motion that does not exceed 10 pages.
2. In its response to appellant's renewed motion for a limited remand, the Government raised several complex arguments. In order to properly brief this Court on these issues, undersigned counsel require additional pages beyond those normally permitted by this Court pursuant to Local

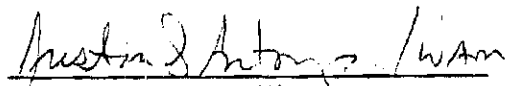
Rule 27(d)(2).

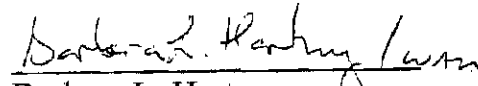
3. On November 26, 2008, pursuant to Local Rule 27(a), undersigned counsel attempted to contact counsel for the United States to inquire about the Government's position on this Motion. As of the time of filing, undersigned counsel had not yet reached counsel for the United States.
4. Therefore, Mr. Moussaoui, through undersigned counsel, respectfully moves that this Court permit appellant to file a reply to the Government's response in excess of the 10 pages normally prescribed by this Court's Local Rules.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that this Court grant this Motion and allow for the filing of an oversized reply.

Respectfully submitted,


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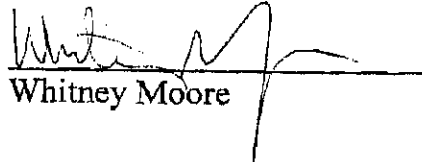
Counsel for Zacarias Moussaoui

November 26, 2008

CERTIFICATE OF SERVICE

I certify that on November 26, 2008, a copy of the foregoing pleading was served on the Court Security Officer for distribution to the following counsel:

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